

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

C.E.A. No. 119 of 2006

DATE OF DECISION: 10.7.2007

Commissioner of Central Excise Commissionerate, Chandigarh

...Appellant

Versus

M/s Pfizer Ltd.

...Respondent

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR

HON'BLE MR. JUSTICE AJAY KUMAR MITTAL

Present: Mrs. Daya Chaudhary, Asstt. Solicitor General of India,
with Mrs. Kamla Malik, Advocate,
for the appellant.

JUDGMENT

M.M. KUMAR, J.

This appeal filed under Section 35-G of the Central Excise Act, 1944 (for brevity, 'the Act'), is directed against order dated 27.12.2005, passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (for brevity, 'the Tribunal'). The revenue has claimed that the following substantial questions of law would arise from the order dated 27.12.2005, passed by the Tribunal:-

- i) Whether in the absence of provisional assessment, duty paid in excess can be adjusted against duty short paid, especially when the refund claim of excess duty is otherwise time barred?

- ii) Whether in view of non availment of modvat credit, the same can be allowed selectively in respect of only few consignments for which duty demand has been confirmed?

The respondent was issued following three show cause notices:-

Date	Period
3.10.2001	9/2000 to 3/2001
24.4.2002	4/2001 to 11/2001
12.12.2002	12/2001 to 5/2002

It was alleged that the assessee had mis-declared the assessable value of the product Salinomycin-350, Mycelia and TMQ (for brevity, ‘Goods’). It is appropriate to mention that the assessee firm is engaged in manufacturing of Oxytetracycline, Amphoteric, Oxytetracycline HCL, TMQ (Terramycin Aequad Salt), Chlorpropamide and Salinomycin, which are covered by Chapter 29 of the Schedule appended to the Central Excise Tariff Act, 1985. The respondent did not sell the entire production of the goods in wholesale trade but captively consumed a part of it in the manufacture of ‘Animal Feed Supplement’ through one of their job worker at Bombay. The assessable value of the goods so captively consumed was required to be determined under Section 4 of the Act read with Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 (for brevity, ‘the 2000 Rules’). The assessee firm was required to file price declaration under Rule 173C(1) of the Central Excise Rules, 1944 (for brevity, ‘the 1944

Rules'), which was filed with the Deputy Commissioner of Central Excise Division, Chandigarh. It was found that the assessee firm had declared the assessable value of the goods on the basis of cost of production/manufacture prevalent during the period from December 1998 to November 1999 @ Rs. 424.29 per kg and December 1999 to November 2000, whereas the goods were cleared during the period September 2000 to March 2001, which should have been assessed at the prevalent assessable value of Rs. 484.98 per kg, which was determined on the basis of cost of goods during the period December 1999 to November 2000, relevant to the financial year 2000-01. As the differential duty on a differential value @ Rs. 60.69 per kg. was required to be determined, a show cause notice dated 8.10.2001 was issued demanding central excise duty of Rs. 5,80,841/- under Section 11A of the Act. A penal action was also proposed under Rule 173Q of the Rules. Similar notices were issued in respect of 4/2001 to 11/2001 on 24.4.2002 and 12/2001 to 5/2002 on 12.12.2002 raising demand of Excise duty amounting to Rs. 4,40,356/- and Rs. 7,57,842/- under Section 11A of the Act alongwith penal action under Section 11AC of the Act read with Rule 25 of the 1944 Rules. Interest was also claimed under Section 11AB of the Act. The Adjudicating Authority held that amount of Rs. 5,80,841/-, Rs. 4,40,356/- and Rs. 5,44,597/- as differential central excise duty on differential value of goods was short paid by the respondent in contravention of the provisions of Section 4(1)(b) of the Act read with rule 8 and proviso to Rule 9 of the 2000 Rules and Rules 4 and 8

of the Central Excise Rules, 2001, which is recoverable from the respondent under Section 11A of the Act along with interest chargeable under Section 11AB. The allegation of mis-declaration of assessable value could not be sustained and, therefore, no penalty under Rule 173Q of the Rules and Rule 25 of the Central Excise Rules, 2002 read with Section 11AC of the Act was imposed.

The orders in original passed by the Adjudicating Authority was carried in appeal. The Commissioner (Appeals), Central Excise, Chandigarh, vide his order dated 6.9.2004, dismissed the appeal. However, on further appeal, the respondent succeeded in persuading the Tribunal to accept its contention that the calculations were based on arithmetical error. It was argued before the Tribunal that on account of error of calculation there was excess demand of about Rs. 1.20 lacs and the demand of central excise duty has been worked out after taking into account only those cases where less payment was made and ignored the payments where more central excise duty was paid. It was further submitted that the respondent was entitled to the benefit of modvat credit on the inputs going into production of the goods in question. The Tribunal after hearing the parties has recorded the following categorical findings:-

“ We have perused the record and considered the submissions made by both sides. There is merit in the appellants contentions under all the three heads. The very first claim is based on arithmetical error. This error is patent and is required to be corrected. The second claim is also to be allowed inasmuch as amount of short

levy for a period cannot be determined without reassessing all the clearances which took place during the relevant period. The omitting of cases where the appellant had erroneously paid more duty would not be correct. Therefore, this grievance is required to be redressed. Modvat credit is also to be allowed, inasmuch as there is no dispute on the eligibility of inputs as well as finished products to credit, both being notified for the purpose of modvat credit.

In view of what is stated above, the appeal is allowed. It is directed that original authority shall recompute the duty amount after allowing relief as indicated therein. The same shall be done after giving opportunity to the appellant to present its case.”

It is, thus, obvious that the contentions raised by the respondent were accepted with regard to payment of excess amount and working out demand in respect of only those cases where amount of central excise duty paid was short. The Tribunal also accepted that the respondent was entitled to modvat credit because there was no dispute on the eligibility of inputs as well as finished products, both being notified for the purpose of modvat credit. The Tribunal, accordingly had directed the Adjudicating Authority to recompute the duty in accordance with the observation made after giving opportunity to the respondent.

Having heard learned counsel for the revenue, we are of the considered view that the questions of law claimed would not

emerge from the order passed by the Tribunal. According to the first substantial question of law claimed, the claim of adjustment of duty paid in excess made by the respondent is claimed to be time barred. A close scrutiny of the order passed by the Tribunal would show that no such issue was raised before the Tribunal. Therefore, adjustment as ordered by the Tribunal would not suffer from any legal infirmity. Likewise, the second question would also not arise from the order of the Tribunal. The revenue did not raise any argument before the Tribunal that modvat credit would not be allowed selectively in respect of few consignments only. Therefore, we find that the appeal is wholly devoid of merit.

For the reasons stated above, this appeal fails and the same is dismissed.

(M.M. KUMAR)
JUDGE

(AJAY KUMAR MITTAL)
JUDGE

July 10, 2007
Pkapoor